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IN THE

Supreme Court of the United States

October Term, 1962

No. 303

MARATHON OIL COMPANY, *Petitioner*

v.

BROOKLYN UNION GAS COMPANY, ET AL.,
Respondents

On Petition For Writ of Certiorari To The United States Court of Appeals, For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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SUBJECT INDEX

	Page
Questions Presented	1
Statement	3
I. The Decision Below Is Clearly Correct	6
II. There Is No Important Question Of Statutory Construction Presented By The Case	7
III. The Opinion Of The Court Of Appeals Does Not Conflict With The Decision Of This Court In The Montana-Dakota Case	9
IV. The Judgment In This Case Is Not In Conflict With The Decision Of This Court In Atlantic Coast Line v. Florida	12
V. The Decision Of The Courts Below Does Not Invade The Domain Of Administrative Action, But Rather Ohio Seeks To Have The Courts Enter This Area	14
VI. The Questions Of Limitations And The Allowance Of Interest Were Both Correctly Decided By The Courts Below, And Are Both Questions Of Texas Substantive Law Raising No Issue Of Importance For This Court To Consider	15
Conclusion	17

LIST OF AUTHORITIES

Cases	Page
Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 249 U.S 134, 145	12
Atlantic Coast Line R. Co. v Florida, 295 U.S. 301	12, 13, 14
Baltimore & Ohio Railroad Co. v. United States, 279 U.S. 781	16
Bel Oil Corporation v. Federal Power Commission, 255 F. 2d 548 (C.A 5, 1958), cert. den. 358 U.S. 804 .	9
Cavitt v. Amsler, 242 S.W. 246 (Tex. Civ App., 1922), err. dis.	16
Central States Electric Co. v. City of Muscatine, 324 U.S. 138	12
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246	9, 10
Natural Gas Pipe Line Co of America v. Harrington, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957	8, 9
Phillips Petroleum Company v. Wisconsin, 347 U.S. 672	6
Southern Pacific Co. v Darnell-Taenzer Lumber Co., 245 U.S. 531	11
Texas Company v. State, 154 Tex. 494, 281 SW. 2d 83, 89, 92 (1955)	16
Williams v. The Pure Oil Co., 124 Tex. 341, 78 S.W 2d 929 (1935)	16

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BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

Respondents disagree with Petitioner's statement of the questions presented.

1. The controlling question in this case is not, as contended by Petitioner, the construction of Section 4(d) of the Natural Gas Act, but whether the stay order of the

Court of Appeals for the Fifth Circuit in *Ohio Oil Company v. Federal Power Commission* not only authorized Ohio to collect increased rates without meeting the filing requirements of Order No. 174-A and Section 4(d) of the Act, but also authorized Ohio to retain such sums without restitution after the expiration of the stay order. This question was answered in the negative by the Court of Appeals, the same court which granted the stay order.

2. Petitioner's second question, based on the fact that the price increases it collected were the same as those allowed by the Commission to another producer who did file its proposed change of rates with the Commission, is not raised by the record in this case and is completely irrelevant, since here the Petitioner did not file its rate schedules or notice of change with the Commission, but instead sought to have the Court of Appeals hold the Commission's regulations invalid and obtained a stay of the regulation pending judicial review. Likewise, there is no question here of "just and reasonable" rates under the Natural Gas Act, since, as was said by the Court of Appeals, (Petitioner's Appendix, p. 4a, R. 837): "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations."

3. Petitioner's third question presented is two-fold in that it concerns (a) limitation, and (b) computation of interest. Both are matters of Texas substantive law which were, as we shall demonstrate, properly decided by the courts below.

Statement

This is a companion case to No. 300, Socony Mobil Oil Company, Inc. v. Brooklyn Union Gas Company, et al., No. 339, Transcontinental Gas Pipe Line Corporation v. Brooklyn Union Gas Company, et al., and No. 344, Brooklyn Union Gas Company, et al. v. Transcontinental Gas Pipe Line Corporation, all filed in this term. The four cases were a single case in the District Court, and, although separately docketed, were considered and decided together by the Court of Appeals and are before this court on a single record.

Respondent adopts the Statement of Facts in this case as set forth in the trial court's opinion (Petitioner's Appendix, pp. 9a-12a, R. 652-656), and approved by the Court of Appeals. (Petitioner's Appendix, pp. 2a and 3a, R. 835-837.)

Ohio's statement of the case requires comment and correction, however, in three particulars:

(a) On page 6, it is stated that:

> "Under date of January 25, 1957, immediately prior to the expiration of the stay of Order 174-A, Ohio filed with the Federal Power Commission its FPC Gas Rate Schedule No. 10, covering the sale of gas here involved (R. 576). This filing, when made, consisted of the basic Sun-Ohio contract of April 30, 1948, and supplements thereto, including supplements covering the price increases which had been placed in effect under the contract during the period of the court stay (R. 228, 576). In acting on this filing, the Commission not only accepted the basic contract, but also allowed to Ohio, without suspension, the full amount of the price increases which had taken place under the contract while the stay of Order No. 174-A was in effect." (R. 577).

By the manner in which the Commission action is stated, it is obvious that Ohio is seeking to have the inference drawn that the Commission retroactively determined the lawfulness of Ohio's increased rates. That such is not the case is apparent from the action of the Commission in accepting Supplement No. 8 to Ohio's Rate Schedule No. 10, the Ohio-Transco Contract. (Page 79 of Exhibit "B" to the Affidavit of Robert M. Vaughan to Ohio's Motion for Summary Judgment, R. 579, not printed, Tr. 681.) Supplement No. 8 filed by Ohio states that:

> "This Supplement takes effect only in the event that the lawful effective rate under 18 C.F.R. 154.92 for gas sold under Rate Schedule No. 10, after the filing date thereof, is the rate which was in effect on June 7, 1954 * * *."

The fact that the Commission accepted Supplement No. 8 under these terms shows that the Commission did in fact find that the lawful effective rate, even after Ohio's filing, until approval of the increase was the rate in effect on June 7, 1954. The Commission expressly so stated in its letter to Ohio of February 1, 1957 (Exhibit "A's' to Plaintiff's Reply to Ohio Oil Company's Brief in Support of Motion for Summary Judgment, not printed, Tr. 1288), saying that Ohio's filings

> "have been accepted for filing at the rate level specified in such rate schedules, or effective supplements for gas sold in interstate commerce for resale as in effect on June 7, 1954."

This is the only action the Commission could have taken, since its allowance of price increases could only operate prospectively from the date of filing. Furthermore, in its

letter to Ohio of August 21, 1957, the Commission pointed out that it would be necessary for Ohio "to refund the amounts charged in excess of the June 7, 1954 rates, for the period from June 7, 1954 * * * until the dates of acceptance of an increased rate by the Commission." (R. 601).

(b) Ohio's petition, pages 6 and 7, emphasizes the Commission's allowance to Sun Oil Company of the prices charged by Sun for the sale of gas to Transco. The prices fixed by the Federal Power Commission for Sun have no possible relevancy here. No one can say that the Commission would have allowed the same prices had Ohio filed. Furthermore, Ohio cannot escape the fact that Sun submitted to the Commission's jurisdiction and filed rate schedules and notices of change as required by the Natural Gas Act as implemented by the orders of the Commission, while Ohio deliberately elected to obtain a stay order and collect increased rates during its pendency without so filing.

(c) On Page 8, Ohio states that the district court found that the only lawful rate in effect during the stay was the June 7, 1954 rate "as established by the order of the Federal Power Commission," that is, Order No. 174-A. Ohio's quotation and citation to the opinion are accurate, but Ohio neglects to add that the courts below found that changes in rates were prohibited, not only by Order No. 174-A, but by Section 4(d) of the Natural Gas Act. See, e.g., Petitioner's appendix, pp. 3a, 4a, and 17a. The District Court said:

> "Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission." (Petitioner's Appendix, p. 17a, R. 662).

The Court of Appeals, in discussing the trial court's opinion, said:

> "As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained." (Petitioner's Appendix, p. 3a, R. 836)

I.

The Decision Below Is Clearly Correct.

This is actually a very simple case. After June 7, 1954, in order for Ohio to raise its rates to Transco, it was necessary for Ohio to file a notice of its intention to raise rates with the Federal Power Commission and to secure approval of the increase from the Commission. Instead of so filing, Ohio, by appealing the Commission's Order No. 174-A to the Court of Appeals, sought in effect to relitigate the holding of this Court in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, and in connection with its appeal obtained a stay order pending judicial review of the Commission's regulations. While the stay order was in effect, it collected increased rates and has now been ordered to make restitution of such increases.

To hold that the stay order of the Fifth Circuit permits Ohio to retain its increased charges would be to permit the courts by stay order to administratively determine the effective rates for sale of gas to interstate pipelines by independent producers. The Fifth Circuit has passed upon and construed the effect of its own stay order. Its opinion makes it clear that it did not, by issuing the stay order, intend to do indirectly what it could not do directly, that is, to invade the administrative field reserved exclusively to the Federal Power Commission.

II.

There Is No Important Question Of Statutory Construction Presented By The Case.

Ohio argues that this case presents an important question of statutory construction which should be resolved by this court. Ohio's argument in effect is that Section 4 of the Natural Gas Act is not a self-executing statutory provision and that the words "such rate" in Section 4 (d) refer only to a filed rate. It seems inconceivable that by refusing to file its rates as required by Section 4 (c) of the Act (a criminal violation of the Act), a natural gas company could then lawfully raise its rates without giving notice to the Commission and to the public as required by Section 4 (d) of the Act. Early in the game Ohio admitted that such was not the case and that it relied solely on the stay order as its mandate to retain excess charges collected during its pendency. In its Reply Brief in the trial court at page 6 Ohio said:

> "Of course, if the Court stay had not been granted, and if Ohio had not made any rate filings and had

> not given the notice required by Order No. 174-A, the June 7, 1954, price would have been and would have remained the lawful price."

In No. 300, Mobil recognizes that the Court of Appeals decision "realistically evaluated * * * demonstrates the stay order affected nothing, protected nothing" (Mobil's Petition, p. 10).

Ohio simply ignores the fact that the stay order, while relieving Ohio temporarily of the filing requirements, did not relieve it from the Section 4 (d) prohibition against raising its rates without notice. The stay order, of course, was intended only to maintain the status quo during the litigation and did not adjudicate any rights of Ohio to increased rates.

Section 4 of the Natural Gas Act is concerned with rates for any "sale subject to the jurisdiction of the Commission." Its filing provisions do not deal with filing "rates" but with filing "schedules" of rates. Section 4(d) prohibits changes in "any such rate", that is, in any rate subject to the jurisdiction of the Commission, except after notice to the Commission. The initial filing of schedules is not a prerequisite to the applicability of the prohibition against changes in rates.

The Petitioner not only disregards the language of the Act, but also the case of *Natural Gas Pipe Line Company of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. denied 356 U.S. 957, relied on by both courts below. In the *Harrington* case, the court ordered restitution of increased rates collected, not pursuant to a change in rates under Section 4(d) of the Act, but in accordance with an order of the Oklahoma Corporation Commission subsequently held to be invalid. The decision was based squarely upon the

prohibition against change contained in Section 4(d) of the Act. The *Harrington* case specifically recognized that there might be a delay in the issuing of regulations, that did not mean that there was no effective lawful rate, but that "the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission." 246 F. 2d at 919. The subsequent case of *Bel Oil Corporation v. Federal Power Commission*, 255 F. 2d 548 (C.A. 5, 1958), cert. denied 358 U.S. 804, made it plain that the applicable contract rate was that rate in effect on June 7, 1954, so even though Order No. 174-A was stayed, the contract rate in effect on June 7, 1954 was still the only effective lawful rate.

In any event, the question of statutory construction which Ohio claims to exist is not one of great importance to anyone other than the parties to this litigation, since the validity of Order No. 174-A has long since been established and the Commission and all independent producers are now operating under the provisions of Order No. 174-A.

III.

The Opinion Of The Court of Appeals Does Not Conflict With The Decision Of This Court In The *Montana-Dakota* Case.

Under its point II, Ohio asserts that the decisions of the courts below are in conflict with the decision of this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246. There is no conflict. *Montana-Dakota* was a reparation case. This is a restitution case to recover an unlawful charge, as distinguished from reparations wherein recovery is sought of past charges which were allegedly "unjust and unreasonable," even though they had

been fixed or approved by the Federal Power Commission or other administrative agency having jurisdiction. There is no issue in this case with respect to the justness and reasonableness of the rates. There is only the question of the effect of the stay order upon the Petitioner's failure to file its rate schedules with the Federal Power Commission.

The possibility of a "windfall" played no part in the decision of this Court in *Montana-Dakota*. There the petitioner contended that the rates charged were unreasonable and were void because established through fraud perpetrated by an interlocking directorate. The court held, first, that the courts have no jurisdiction to consider the question of the reasonableness of rates under the Federal Power Act, because that is a matter exclusively within the jurisdiction of the Commission. Second, the court held that the action for fraud could not arise under the Federal Power Act, but was a common-law right not maintainable in Federal court in the absence of diversity of citizenship. Third, the court held that the case should not be remanded to the district court to refer issues to the Federal Power Commission for decision, because the Commission would itself be without jurisdiction to grant reparations, and this lack of jurisdiction should not be circumvented by judicial action.

The *Montana-Dakota* case does, however, support the trial court's decision that Ohio is not entitled to any other rate during the period in question than that fixed as of June 7, 1954. The Court said at 341 U.S. 251:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise

of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

It should also be pointed out that Ohio has no standing to assert the defense of "windfall". Ohio assumes that the price increases paid by Respondents were passed on to Respondents' customers, and asserts this as a defense. It is settled, however, that this defense is not available to Ohio. In *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, a suit by a shipper to recover reparations from the railroads, Mr. Justice Holmes said at page 533:

"The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonble charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages, at least, is not to go beyond the first step. As it does not attribute remote circumstances to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law, and it does not inquire into later events."

The holding of this case was expressly carried forward into the field of charges paid for natural gas by the case of *Central States Electric Co. v. City of Muscatine*, 324 U.S. 138. In that case, Central purchased gas at wholesale from Pipeline. Citing the *Southern Pacific* case, the court said at 324 U.S. 145:

> "Moreover, if Central had paid Pipeline the excessive rates, the latter could not have defended a suit by Central to recover the excess on the ground that Central had passed on the burden to its customers."

IV.

The Judgment In This Case Is Not In Conflict With The Decision Of This Court In *Atlantic Coast Line v. Florida.*

Ohio's third point is that the judgment in this case is a departure from accepted principles of law as established by this court in *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301. That case is a leading case in the field of restitution, but is of no benefit to Ohio. On the contrary, that case actually lends support to the judgment of the courts below awarding restitution to the Respondents.

In *Atlantic Coast Line*, the railroad had been required by order of the Interstate Commerce Commission to collect increased rates. The order of the Commission was subsequently set aside as void "solely upon the ground that the facts supporting the conclusion were not embodied in the findings." (295 U.S. 311) The Court expressly recognized as a rule of general application the rule of *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, "that a party against whom an erroneous judgment or decree has been carried into effect is entitled,

in the event of a reversal, to be restored by his adversary to that which he has lost thereby." But this Court said that the rule was not without exceptions, and found that the circumstances in that case constituted an exception, because the Commission order was erroneous only because of the failure of the Commission to include the facts in its findings. The Court said at 295 U.S. 314 that when the federal court looks at that case: "It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays." In this case, there was no order fixing higher rates which Ohio was required to obey, and there were no "blunders of procedure," no "administrative delays." Ohio refused to submit its rates to the Commission and by affirmative action, sought a stay of Order No. 174-A. At Ohio's instigation, a stay was granted by the Court of Appeals. This cannot be called a "blunder of procedure" or "administrative delay" but for which the rate charged would have been lawful.

The result for which Ohio here contends is exactly the opposite of that found by Justice Cardozo to exist in the *Atlantic Coast Line* case, when he said at page 316:

> "The rates now recognized as just are not a fabrication of the judges. They have not been fixed by a court to take effect thereafter. They are the rates prescribed for the future by the appointed administrative agency * * *."

Ohio asks this Court to find that when the Court of Appeals issued the stay, that court fabricated rates, and fixed them to take effect thereafter. Here there was a rate

prescribed for the future by the appointed administrative agency, as well as by the Natural Gas Act (the contract rate in effect on June 7, 1954), and that was not the rate charged by Ohio.

The majority opinion in the *Atlantic Coast Line* case demonstrates that this case does not constitute a departure from the general rule there stated by the Court. Even under the facts of that case, four of the justices thought that restitution should have been required.

On pages 16 and 17 of its petition, Ohio sets forth what it considers to be equitable considerations in its favor. Suffice it to say that Ohio's situation is of its own making. Ohio was the moving party in obtaining the stay order on which it now relies to permit it to retain rates which were never filed with or approved by the Federal Power Commission. As was so aptly said by the district court (Petitioner's Appendix, p. 19a, R. 664):

> "In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them."

V.

The Decision Of The Courts Below Does Not Invade The Domain Of Administrative Action, But Rather Ohio Seeks To Have The Courts Enter This Area.

Under its point IV, Ohio states that the courts below in effect determined what was a "just and reasonable" rate

by deciding what was the "lawful" rate for the period in question in this case, because a rate could not be unlawful unless it has been specifically found to be unjust and unreasonable by the Commission. The clear error in this position demonstrates that this point is not raised by the record in this case and creates no issue for decision by this Court.

Under Ohio's statement, any rate would be lawful so long as it had not been found by the Commission to be not "just and reasonable". This would mean that any such rate, even though unfiled would be lawful. But, as Ohio has previously admitted in the trial court, (see pages 7-8, supra), this is not true. An increased rate may be eminently just and reasonable, but if it has not been filed with the Commission it is not the lawful rate. Ohio's reasoning under this point completely overlooks the fact that to give the stay order the construction of permitting Ohio to obtain rates in excess of its June 7, 1954 rate would be to permit the fixing of effective lawful rates by the courts, which they may not do. Even the standard of restitution suggested by Ohio, the difference between the contract prices and what might be determined to be a "just and reasonable" rate, would be *improper because the courts* would thereby be invading the administrative domain. This point is not raised by the record in this case and raises no issue for decision by this court.

VI.

The Questions Of Limitations And The Allowance Of Interest Were Both Correctly Decided By The Courts Below, And Are Both Questions Of Texas Substantive Law Raising No Issue Of Importance For This Court To Consider.

Under its point V, Ohio raises two issues. The first is the defense of limitations. The trial court properly held that the cause of action for restitution did not arise until the dissolution of the stay orders on February 1, 1957. Had an attempt been made prior to that time to recover the rates collected in excess of the June 7, 1954 rate, Ohio could and doubtless would have replied that the issue involved in such suit was the validity and applicability to Ohio of Order No. 174-A and Section 4(d) of the Natural Gas Act, and that no overcharges could be recovered until that issue was settled. The obligation to refund the excess amount collected together with interest thereon from the date of each payment to Ohio, arose on the date when the stay order was dissolved. *Baltimore & Ohio Railroad Co. v. United States*, 279 U.S. 781; *Cavitt v. Amsler*, 242 S.W. 246 (Tex. Civ. App., 1922), error dismissed; *Williams v. The Pure Oil Co.*, 124 Tex. 341, 78 S.W. 2d 929 (1935).

With respect to the allowance of interest, under Texas law, which applies here, it is settled that in a case such as this the award of interest is not discretionary, but as a matter of law respondents are entitled to interest, not from the date of the dissolution of the stay order, but from the date when the principal damages were fixed by conditions existing at the time the injury was inflicted, that is at the time of each payment to Ohio. *Texas Company v. State*, 154 Tex. 494, 281 S.W. 2d 83, 89, 92 (1955). Furthermore, even under the decisions of this court, at the time the cause of action arose it included the claim for interest from the date of each payment. *Baltimore & Ohio Railroad Co. v. United States*, supra.

Both of these questions, the applicability of the Texas statute of limitations and the application of the Texas law with respect to the allowance of interest, are matters of local law which present no issue of importance to this court for decision, and both issues were correctly decided below.

CONCLUSION

In view of the foregoing, Respondents respectfully pray that the petition for a writ of certiorari by Marathon Oil Company be denied.

Respectfully submitted,

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September 7, 1962